



Legal Update

November 13, 2013

Massachusetts SJC Imposes Restrictions on Police Testimony in OUI Trials

During OUI trials, police officer witnesses may offer an opinion as to a defendant's level of sobriety or intoxication, but cannot offer an opinion as to whether the defendant's consumption of alcohol diminished his ability to safely operate a motor vehicle or opine whether the defendant operated the vehicle while under the influence of alcohol.

Commonwealth v Joseph J. Canty Jr., SJC No. 11315 (2013)

Background: Officer Frank Bulman (hereinafter referred to as "Officer Bulman") was on patrol when he observed a vehicle almost strike a curb. Officer Bulman followed the vehicle which crossed the fog line, "drift back" and cross the double yellow line. Based on these observations, Officer Bulman activated his blue lights for the defendant to stop the vehicle. The defendant did not immediately stop and had difficulty putting the vehicle in park until Officer Bulman assisted. The defendant also had difficulty retrieving his identification from his wallet and giving it to Officer Bulman. Officer Bulman smelled an odor of alcohol coming from the defendant's breath and the defendant told Officer Bulman he only had four (4) drinks earlier in the evening.

Officer Bulman asked the defendant if he would perform field sobriety tests and he consented. As the defendant exited the vehicle, he tripped and "almost stumbled." Officer Bulman first demonstrated "the walk and turn test," which the defendant walked as though "a severe wind was blowing him to the side." The defendant failed to maintain his balance without putting his foot down on three separate occasions during the one legged stand test. Another officer arrived on

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scene to assist Officer Bulman. The assisting officer witnessed the defendant performing the field sobriety tests and he also found a half-empty bottle of brandy inside the defendant's vehicle. The defendant was arrested for OUI and subsequently indicted on six charges.

The defendant pled guilty to four indictments and he elected defendant elected to proceed to trial on two of the indictments: Operating Under the Influence of Alcohol and Negligent Operation of a Motor Vehicle. A jury convicted the defendant of both charges. The defendant appealed his convictions on two issues. The first appeal involved a flawed indictment and has minimal impact policing. The second issue on appeals questions whether there are any restrictions to police officer opinion testimony during OUI trials.

The defendant filed a motion prior to trial to exclude any police officers offering an opinion as to whether the defendant "was either intoxicated, impaired, or otherwise under the influence of alcohol." The defendant argued that the jury must decide whether the defendant was impaired. The judge denied the motion and held that a "lay witness can give an opinion as to an individual's sobriety." The judge instructed the jury that they may accept or reject any witness's opinion as to whether the defendant was under the influence of alcohol.

During trial, the prosecutor asked Officer Bulman the following questions:

Prosecutor: "And at that point [after the field sobriety tests] had you formed any opinion as to his sobriety, officer, based on your observations?"

Officer Bulman: "Yes, I did."

Prosecutor: "And what was that opinion?"

Officer Bulman: "I believed that his ability to drive was diminished."

Prosecutor: "Did you have any opinion as to what may have caused that diminished capacity?"

Officer Bulman: "I believe it was alcohol consumption."

The defendant did not object to any of these questions during the trial. Aside from this exchange between Officer Bulman and the prosecutor, there was overwhelming evidence regarding the defendant's diminished capacity to operate a motor vehicle. "The defendant's erratic driving, his bloodshot eyes, the odor of alcohol, his apparent inability to put his vehicle in "park," his poor performance on the field sobriety test, his admission that he had been drinking alcohol, and the discovery of a half-empty bottle of liquor in his vehicle, " were additional factors the jury considered prior to rendering a verdict. The defendant was convicted and appealed arguing that Officer Bulman's testimony regarding the defendant's ability to operate a motor vehicle was a question for the **jury** to decide.

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Conclusion: Although the defendant appealed his convictions on two issues. The main issue that impacts policing involves what police officers can testify to during OUI trials.

The SJC affirmed the convictions and held the following:

1. Officer Bulman's testimony regarding whether the defendant's level of intoxication impacted his ability to operate a motor vehicle was not permissible. However, based on the facts and circumstances specific to this case, the defendant was not prejudiced and the conviction was upheld.
2. The flawed indictment did not violate the defendant's due process rights because he the defendant had fair notice of the charges brought against him prior to pleading guilty.

Significant Issue: Police testimony regarding sobriety:

The SJC concluded that that a "police officer who observed the defendant may offer an opinion as to the defendant's level of intoxication arising from the consumption of alcohol, but may not offer an opinion as to whether the defendant's intoxication impaired his ability to operate a motor vehicle." In *Commonwealth v Jones*, the SJC previously held that police officers can offer an opinion as lay witnesses as to whether they believe the person is intoxicated. *Commonwealth v Jones*, 464 Mass. 16 (2012). Although police can testify to a person's level of intoxication, they are prohibited from directly offering an opinion regarding the defendant's guilt or innocence in a criminal case, see *Commonwealth v. Hamilton*, 459 Mass. at 439. When an opinion comes close to the ultimate issue of guilt or innocence, the probative value of the opinion must be weighed against the danger of unfair prejudice. See *McCormick on Evidence*, supra at § 11, at 76 and *Mass. G. Evid.*, supra at § 403, and cases cited. "The balance the SJC reached was that a lay witness in a case charging operation of a motor vehicle while under the influence of alcohol may offer his opinion regarding a defendant's level of sobriety or intoxication but may not opine whether a defendant operated a motor vehicle while under the influence of alcohol or whether the defendant's consumption of alcohol diminished his ability to operate a motor vehicle safely." See *Commonwealth v. Jones*, 464 Mass. at 17 n.1.

Although the SJC agreed that Officer Bulman's should not have opined that the defendant's "ability to drive was diminished" by his consumption of alcohol," during trial, the SJC did not find it prejudicial and therefore did not reverse the convictions.

Commentary: *Canty* specifically impacts what police officer witnesses' testimony during OUI trials. Police officers can continue to testify about any observations they make during an

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OUI stop and offer an opinion as to whether a person is intoxicated. However, police officers should not offer an opinion as to whether a person's level of intoxication impacts that person's ability to drive. The reasoning behind the decision is that a **jury** is responsible for deciding whether the defendant's level of intoxication diminishes the person's ability to drive. In light of *Canty*, the best practice is to consult with your DA's office to determine what opinion testimony would be permissible during OUI trials.

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